

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR**

IN THE MATTER OF

ROBERT L. SHERRY,

Respondent.

)
) CASE NO. SEC-2011-239
)
) **FINAL AGENCY DECISION**
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INTRODUCTION

The Commissioner of Securities and Insurance, Montana State Auditor (Commissioner), has reviewed the Hearing Examiner's October 25, 2012, Proposed Findings of Fact, Conclusions of Law and Order (Proposed Order) in this matter (Exhibit A). The Proposed Order notified Respondent that he had 30 days to file exceptions to the Proposed Order and failure to respond within that time would constitute a waiver of his right to judicial review of this decision.

Robert L. Sherry (Respondent) timely filed exceptions to the Proposed Order, and requested oral argument. The Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI) responded to Respondent's exceptions to the Hearing Examiner's proposed decision.

The Commissioner issued an Order Regarding Oral Arguments on November 26, 2012, setting the time, place, and order of the Oral Argument proceedings. Respondent timely filed a request for his presentation of his oral argument by telephone, which the Commissioner granted by Order on December 21, 2012.

Oral Arguments were held on January 3, 2013. Respondent, *Pro Se*, was given the opportunity to present his exceptions to the Hearing Examiner's Proposed Order. Mike Winsor, attorney for the CSI, presented the CSI's response to Respondent's exceptions.

STANDARD OF REVIEW

In reviewing the Hearing Examiner's Proposed Order after listening to the Oral Arguments, the Commissioner adheres to the Montana Administrative Procedure Act (MAPA) regarding contested cases. Mont. Code Ann. § 2-4-621. Specifically, Mont. Code Ann. § 2-4-621(3) provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

As noted in *Ulrich v. State ex rel Board of Funeral Serv.*, 1998 MT 196, MT ¶ 14, 289 Mont. 407, 961 P.2d 126:

When conducting a review of the Board's decision, we note that the Board, which did not personally hear or observe the evidence, does not have the authority to conduct a *de novo* review of the hearing examiner's decision. Rather, it may reject the examiner's findings only if they are not based upon competent, substantial evidence. Additionally, the Board must state with particularity that the findings are not based upon competent, substantial evidence ... [omitting partial quote of Mont. Code Ann. § 2-4-621.]

A rejection of the hearing examiner's findings in violation of Mont. Code Ann. § 2-4-621(3) constitutes an abuse of discretion pursuant to § 2-4-704(2)(a)(vi). [omitting citation]

In interpreting MAPA, however, the Montana Supreme Court has held that a Hearing Examiner's findings of fact may be modified or rejected in other circumstances. See *In the Matter of the Grievance of Brady*, 1999 MT 153, 295 Mont. 75, 983 P.2d 292. The Commissioner may determine that certain of the Hearing Examiner's findings of fact are based on an interpretation of law and, therefore, such findings of fact may be rejected or modified like conclusions of law by the Commissioner. *Id.* at ¶ 14.

With regard to the Hearing Examiner's conclusions of law interpreting and applying the Montana Insurance Code, Mont. Code Ann. § 33-1-101, et seq., and Securities Act of Montana, Mont. Code Ann. § 30-10-101, et seq., and rules promulgated thereunder, the Commissioner may determine that the Hearing Examiner misinterpreted the law and may modify or reject the Hearing Examiner's proposed Conclusions of Law. *Id.* at ¶ 14; *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474, 803 P.2d 601, 603. Further, the Commissioner may accept or reduce the recommended penalty in the Hearing Examiner's proposed decision, but may not increase it without a review of the complete record. Mont. Code Ann § 2-4-621(3).

After due consideration of the entire record in this matter including, but not limited to, the transcript of the hearing held on Monday, May 21, 2012, through Wednesday, May 23, 2012, and all exhibits admitted into evidence, all pleadings, and the oral arguments held on January 3, 2013, on Respondent's exceptions to the Hearing Examiner's Proposed Order, the Commissioner finds good cause to enter the following:

ORDER

1. The proposed Findings of Fact, Conclusions of Law and Order (Collectively Exhibit A) are adopted in part as the Final Agency Decision in this matter

and by this reference is made a part of this Final Agency Decision. The Findings of Fact are adopted in full. The Conclusions of Law are adopted with the following modification:

- (a) Page 21, Section 6 is amended to read: Although generally most annuity contracts are life insurance products and governed by the Montana Insurance Code, and may be sold by insurance producers, *Estate of Miles v. Miles*, 2000 MT 41, MT ¶ 41, 298 Mont. 312, 994 P.2d 1139; Mont. Code Ann. §§ 33-17-214, 33-20-101, the definition of a "security" under the Act (Securities Act of Montana) includes a "variable" annuity. *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959); *Estate of Miles*, ¶ 41, *supra*; Mont. Code Ann. § 33-20-803(3).¹

The Order is adopted in part. Specifically, the following reflects a restatement of the Order, with supplemental changes which were left to the discretion of the Commissioner:

2. In accordance with Mont. Code Ann. § 30-10-305, Respondent is hereby fined \$5,000 for each of the following violations of Mont. Code Ann. § 30-10-201(3):

- (a) giving investment advice, for compensation, to the [REDACTED] without a securities license;
- (b) giving investment advice, for compensation, to the [REDACTED]² by advising them as to the value of their securities.

¹ This change reflects a modification in the conclusions of law. The Proposed Order stated that Mont. Code Ann. § 30-10-103(22) (defining "security" under the Securities Act) included "variable" annuities. This citation was in error. The modification also includes corrected citation for *Estate of Miles v. Miles*, and the addition of citing Mont. Code Ann. § 33-20-803(3) (exempting insurance annuity suitability laws for "variable annuities regulated under Title 30, chapter 10").

² [REDACTED] are two people, which represent two separate violations of Montana law.

3. In accordance with Mont. Code Ann. § 30-10-305, Respondent is hereby fined \$5,000 for each of his following violations of Mont. Code Ann. § 30-10-301(1)(b):

- (a) telling the [REDACTED]³ they could undo the transactions at issue within 30 days without any consequences;
- (b) omitting information relating to the value of Mrs. [REDACTED] lifetime income benefit rider and the value of her death benefit from her Replacement Comparison form;
- (c) failing to tell the [REDACTED] that he (Respondent) was required to be securities licensed in order to make the recommendation to the [REDACTED] to sell their securities.

4. In accordance with Mont. Code Ann. § 30-10-305, Respondent is hereby fined \$5,000 for each of the following violations of Mont. Code Ann. § 30-10-301(1)(c):

- (a) recommending to the [REDACTED] that they sell their variable annuities in order to purchase the fixed indexed annuities from him without the requisite licensure, skill, and knowledge to ascertain whether the sales of their securities and the purchases of fixed indexed annuities were suitable for them;
- (b) submitting the paperwork to liquidate the [REDACTED]³ variable annuities and purchase their fixed indexed annuities without authorization from the [REDACTED]³;
- (c) telling the [REDACTED]³ that they could undo the transactions at issue within 30 days without consequences.

³ [REDACTED] are two people, which represent two separate violations of Montana law.

5. In accordance with Mont. Code Ann. §§ 33-1-317 and 33-17-1001, Respondent is hereby fined \$5,000 for engaging in conduct that was fraudulent, coercive, or dishonest practices and for being a source of injury or loss to the public in violation of Mont. Code Ann. § 33-17-1001.

6. In accordance with Mont. Code Ann. § 30-10-309(1), Respondent shall pay any and all costs related to this proceeding within 30 days of this Order. These costs shall include reasonable attorney fees, and costs associated with bringing the administrative action, in the amount of \$4,183.48.⁴

7. In accordance with Mont. Code Ann. § 30-10-309, Respondent shall pay restitution to the [REDACTED] for all financial losses sustained by the [REDACTED] as a result of each of the violations of Mont. Code Ann. § 30-10-301, together with ten percent (10%) annual interest from the date of the violations or the date each monthly payment became due.⁵

Specifically, Respondent shall make restitution to the [REDACTED] pursuant to the following terms:

- (a) For Mr. [REDACTED] Respondent shall pay \$2,313.51 within 30 days upon execution of this Order. This reflects Mr. [REDACTED]'s total loss of \$1,916.76 in the form of three payments for the months of January through March 2011, plus ten percent (10%) interest for 720 days.⁶

⁴ This amount solely reflects the Hearing Examiner's total bill for this proceeding (Attached as Exhibit B).

⁵ The restitution payments are derived from the proposed findings of facts, which have been adopted in full.

⁶ Calculated from the date of this Order.

- (b) Respondent shall pay Mr. [REDACTED] \$4,272.78 within 30 days upon execution of this order. This amount reflects 24 months⁷ of lost monthly income in the amount of \$161.95, with 10 percent interest.
- (c) Respondent shall pay Mr. [REDACTED] \$161.95 per month to Mr. [REDACTED] for the rest of Mr. [REDACTED] life. This amount reflects Mr. [REDACTED] loss in benefit base since April 2011. Respondent shall begin making these payments starting the first full month after execution of this Order.
- In the alternative, and in the interests of providing an immediate payment of restitution and resolution of this matter, Respondent may pay Mr. [REDACTED] \$21,619.50 within 30 days upon execution of this Order. This is the present value of the payment stream for the next 15 years assuming a two percent (2%) annual return.
- (d) Additionally, Respondent shall pay Mr. [REDACTED] \$6,000.07 in lost death benefits. Respondent shall pay this within 30 days upon execution of this Order.
- (e) For Mrs. [REDACTED] Respondent shall pay \$1,662.65 within 30 days upon execution of this Order. This number reflects Mrs. [REDACTED] loss of \$1,374.09 in the form of three payments between January through March 2011, plus ten percent (10%) interest for 720 days.⁸

⁷ Calculated from April 2011 through the date of this Order.

⁸ Calculated from the date of this Order.

- (f) Respondent shall pay Mrs. [REDACTED] \$2,454.70, within 30 days upon execution of this Order. This amount reflects 24 months⁹ of lost monthly income in the amount of \$93.04, with 10 percent interest.
- (g) Respondent shall pay \$93.04 per month to Mrs. [REDACTED] for the rest of Mrs. [REDACTED]'s life. This amount reflects Mrs. [REDACTED] loss in benefit base.

Respondent shall begin making these payments starting the first full month after execution of this Order.

In the alternative, and in the interests of providing an immediate payment of restitution and resolution of this matter, Respondent may elect to pay Mrs. [REDACTED] \$12,443.42 within 30 days upon execution of this Order.

This is the present value of the payment stream for the next 15 years assuming a two percent (2%) annual return.

- (h) Respondent shall pay Mrs. [REDACTED] \$6,662.97 in lost death benefits. Respondent shall pay this amount within 30 days upon execution of this Order.

8. Pursuant to Mont. Code Ann. § 33-17-1001:

- (a) the insurance producer license of Respondent is hereby revoked; and
- (b) all but \$5,000 in fines shall be suspended, conditional upon Respondent making restitution to the [REDACTED] as identified in section 7 of this Order.¹⁰
- Suspension of the full fine amounts is explicitly contingent on Respondent making restitution payments pursuant to sections (7)(a), (b), (d), (e), (f),

⁹ Calculated from April 2011 through the date of this Order.

¹⁰ This suspended amount shall also include the Hearing Examiner's total bill for \$4,183.48. The non-suspended \$5,000 fine shall be made payable to the State of Montana and sent to the Office of the Commissioner of Securities and Insurance, Montana State Auditor, c/o Legal Bureau, 840 Helena Avenue, Helena, MT 59601.

and (h) within 30 days upon execution of this Order.¹¹ Suspension of the full fine amount is also contingent upon Respondent making restitution pursuant to section (7)(c) and (g) of this Order. Respondent's failure to pay restitution, at any time, shall result in payment of the full fine amount.

9. Pursuant to Mont. Code Ann. § 33-17-1001(1), and solely for the purpose of seeking restitution for the [REDACTED] Respondent shall be issued a probationary individual insurance producer's license under the following conditions:

- (a) Respondent's probationary individual insurance producer's license is explicitly contingent upon giving Respondent a means to provide restitution to the [REDACTED] Respondent shall be issued the probationary license only after making all restitution payments which are due within 30 days upon execution of this Order, and paying the non-suspended \$5,000 fine.¹²
- (b) After paying restitution amounts due within 30 days upon execution of this Order, Respondent shall be issued a probationary license. Maintenance of the probationary license is contingent upon Respondent meeting the following conditions:
 - (i) Respondent shall complete approved insurance producer continuing education courses and meet the continuing education requirements for insurance producers.
 - (ii) Upon issuance of the probationary license, Respondent shall

¹¹ This amount totals \$23,366.68.

¹² This reflects all restitution payments except for the monthly payments due to the [REDACTED] If Respondent elects to pay the liquidated amount, as specified in section (7)(c) and (g) of this Order, and pays all restitution amounts within 30 days upon execution of this Order, he shall be issued the probationary license.

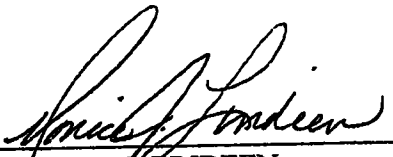
complete ten continuing education credits on the subject of ethics over the course of two years, six of which shall be obtained in the first year. This is in addition to Respondent's legal requirements regarding continuing education.

- (ii) Within two weeks of attending a Continuing Education course, Respondent shall submit a copy of the Course Completion Certificate to the CSI. Failure to maintain adequate licensure shall result in revocation of Respondent's probationary license.
- (iii) If Respondent elects to make monthly restitution payments to the [REDACTED] pursuant to section (7)(c) and (g) of this Order, Respondent shall report to the CSI proof of all payments. Respondent may mail proof of restitution payments to the Office of the Commissioner of Securities and Insurance, Montana State Auditor, c/o Legal Bureau, 840 Helena Avenue, Helena, MT 59601. In the alternative, Respondent may elect to email proof of monthly payments. Failure to timely pay monthly restitution or failure to provide proof of payments as specified in this Order shall result in revocation of Respondent's probationary license.
- (iv) Upon issuance of Respondent's probationary license, Respondent shall, on the first day of each month, provide the CSI with notice of all annuities Respondent sold in Montana that Respondent is duly licensed to sell.

- (v) Respondent's failure to timely pay any restitution amounts, or failure to comply with the terms of this Order, including, but not limited to failing to provide proof of monthly restitution payments, and/or failure to provide notice of Respondent's annuity sales in Montana, at any time following the execution of this Order, shall result in revocation of Respondent's probationary individual producer license and shall trigger immediate payment of all suspended fines, fees, and restitution as outlined in this Order.

10. In the event of an appeal, the Commissioner reserves the right to recalculate restitution payments upon final adjudication of the appeal.

SO ORDERED this 6th day of March, 2013.



MONICA J. LINDEEN
Commissioner of Securities and Insurance,
Montana State Auditor

CERTIFICATE OF SERVICE

I hereby certify the foregoing was served on the 7th day of March, 2013, to the following:

By Hand Delivery:

Mike Winsor
Office of the Commissioner of Securities and
Insurance, Montana State Auditor
840 Helena Avenue
Helena, MT 59601

By US mail, first-class postage paid:

Robert L. Sherry
804 8th Avenue West
Kalispell, MT 59901

A handwritten signature in cursive script, appearing to read "Paul Barber", is written over a horizontal line.

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BEFORE THE MONTANA STATE AUDITOR
AND COMMISSIONER OF SECURITIES AND INSURANCE
HELENA, MONTANA

IN THE MATTER OF:) Case No. SEC-2011-239
ROBERT L. SHERRY,) HEARING EXAMINER'S
Respondent.) PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Pursuant to mailed notice, on Monday, May 21, 2012, through
Wednesday, May 23, 2012, at the office of the Commissioner of
Securities and Insurance (CSI), a contested case hearing was
conducted by the undersigned hearing examiner in this matter.
The hearing was conducted pursuant to the hearings and appeals
provisions of the Securities Act of Montana (Mont. Code Ann.
§§ 30-10-101, et seq.); Montana Insurance Code (Mont. Code Ann.
§§ 33-1-101, et seq.); the contested case provisions of the
Montana Administrative Procedure Act (Mont. Code Ann. §§ 2-4-601,
et seq.); and Montana's statutory, public participation in
governmental operations notice and hearing provisions (Mont. Code
Ann. §§ 2-3-101, et seq.).

At the contested case hearing, Mike Winsor, Legal Counsel
for the Commissioner of Securities and Insurance, Montana State

1 Auditor (Commissioner) represented the CSI. Respondent,
2 Robert L. Sherry (Sherry) appeared pro se via telephone.

3 Testimony was received on behalf of CSI from investors [REDACTED]
4 [REDACTED] and [REDACTED] independent insurance broker and
5 investment advisor, George Spencer Withey; CSI Compliance
6 Specialist, Ronald Herman; CSI Deputy Securities Commissioner,
7 Lynne Egan; and Sherry. Sherry presented testimony from the
8 [REDACTED] Withey, and himself.

9 The following document copies were offered by the CSI either
10 by stipulation or without objection, and were admitted into
11 evidence: Life Sales, LLC promotional mailer (Exhibit 1); Life
12 Sales, LLC promotional mailer return card filled out by [REDACTED]
13 [REDACTED] (Exhibit 2); December 13, 2010, "Allianz Life Insurance
14 Company Endurance Plus Annuity Illustration" (Exhibit 3); [REDACTED]
15 [REDACTED] December 16, 2010, "Allianz Annuity Application" and
16 "Supplemental Application" (Exhibit 4); [REDACTED]
17 December 16, 2010, "Allianz EnduranceSM Plus Annuity Statement of
18 Understanding" (Exhibit 5); [REDACTED] December 16, 2010,
19 "Allianz Product Suitability Form" and "Attention: Allianz
20 Suitability Evaluations Endurance Plus Annuity" form (Exhibit 6);
21 [REDACTED] December 16, 2010, "Authorization to Transfer
22 Funds" (Exhibit 7); [REDACTED] December 16, 2010, "Allianz
23 Replacement Comparison" form (Exhibit 8); [REDACTED]
24 December 16, 2010, "Allianz Important Notice: Replacement of Life
25 Insurance or Annuities" form (Exhibit 9); [REDACTED] Declination
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1 letter to Allianz (Exhibit 10); February 4, 2011, Allianz refund
2 letter to [REDACTED] and Allianz check No. 0008854931 (Exhibit
3 11); June 22, 2011, Allianz-E. [REDACTED] "Settlement Agreement
4 and Release" (Exhibit 19); December 20, 2010, "Allianz MasterDex
5 XSM Annuity" illustration form for [REDACTED] (Exhibit 20);
6 [REDACTED] December 16, 2010, "Allianz Annuity Application"
7 and "Supplemental Application" (Exhibit 21); [REDACTED]
8 December 16, 2010, "Allianz MasterDex XSM Annuity Statement of
9 Understanding Preliminary Contract Summary" (Exhibit 22); [REDACTED]
10 [REDACTED] December 16, 2010, "Allianz Product Suitability Form"
11 (Exhibit 23); [REDACTED] December 16, 2010, "Attention:
12 Allianz Suitability Evaluations" form (Exhibit 24); [REDACTED]
13 [REDACTED] December 16, 2010, "Allianz Authorization to Transfer
14 Funds" form (Exhibit 26); [REDACTED] December 16, 2010,
15 "Allianz Replacement Comparison" form (Exhibit 28); [REDACTED]
16 [REDACTED] December 16, 2010, "Allianz Important Notice:
17 Replacement of Life Insurance or Annuities" form (Exhibit 29);
18 [REDACTED] Applicant: Allianz MasterDex-X Fixed
19 'Indexed' Annuity Present Policy Results Breakdown with AIG
20 SunAmerica Life, Policy number P89A7511340" signed by Bob Sherry,
21 Agent (Exhibit 30); February 4, 2011, Allianz refund letter to
22 [REDACTED] and Allianz check No. 0008855344 (Exhibit 31);
23 March 4, 2011, letter from Robert L. Sherry to CSI Compliance
24 Specialist Ron Herman (Exhibit 32); May 27, 2011, letter from
25 Robert L. Sherry to CSI Compliance Specialist Ron Herman
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1 (Exhibit 33); May 9, 2011, letter from George Withey to Ron
2 Herman having Bates No. 000040-000041 (Exhibit 36); June 3, 2011,
3 John Hancock Fax cover sheet and attached 2010 John Hancock
4 Venture Vantage Annual Statement for [REDACTED] (Exhibit 39);
5 June 3, 2011, SunAmerica Fax cover sheet with: Certificate Data
6 Page and [REDACTED] SunAmerica Polaris Choice III Variable
7 Annuity Quarterly Statement for the period October 1 to December
8 31, 2010 (Exhibit 41); assorted 15 pages from [REDACTED]
9 SunAmerica Annuity statements from 2007 to 2010 (Exhibit 43); PHS
10 Summary for Robert Sherry, [REDACTED] file #42950 (Exhibit 44);
11 December 16, 2010, "Attention: Allianz Suitability Evaluations
12 Endurance Plus Annuity" (Exhibit 65); December 16, 2010,
13 "Attention: Allianz Suitability Evaluations" (Exhibit 66);
14 December 17, 2010, UPS Shipping Document (Exhibit 76); UPS Proof
15 of Delivery for Tracking Number J1455050462 (Exhibit 77); Family
16 Financial Analysis (Exhibit 78); June 4, 2011, letter from [REDACTED]
17 [REDACTED] to Ron Herman (Exhibit 95); and December 16, 2010,
18 Supplement to the Replacement Comparison from Sherry
19 (Exhibit 101).

20 The following document was offered and admitted into
21 evidence over objection: January 5, 2011, letter from Withey to
22 the [REDACTED] (Exhibit 102).

23 In addition, the following documentary Exhibits also were
24 admitted into evidence via stipulation: Exhibits 12-18, 25, 27,
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1 34-35, 37-38, 40, 42, 45-59, 61, 63-64, 67-69, 71-74, 80-81, 83-
2 85, 93-94, 96-100.

3 From the testimonial and documentary evidence presented, the
4 Hearing Examiner makes the following proposed:

5 FINDINGS OF FACT

6 1. In February, 2011, CSI Compliance Specialist, Ronald
7 Herman (Herman) was assigned a complaint received from Dale and
8 [REDACTED] (Tr. 359-60.) The substance of their
9 complaint was that without their permission the Respondent,
10 Robert Sherry (Sherry) had surrendered their variable annuities
11 with John Hancock and SunAmerica to Life Insurance Company of
12 North America (Allianz), resulting in the [REDACTED] incurring not
13 only a loss of \$10,000 in surrender penalties, but also a \$60,000
14 income base loss that reduced their guaranteed monthly income by
15 \$247.47. (Tr. 360-61; Exh. 44.) Herman investigated the
16 [REDACTED] complaint. (Tr. 360; Exh. 44.)

17 2. Sherry is a Montana licensed insurance producer who
18 transacts insurance business from Kalispell, Montana. (Tr. 398,
19 579.) In 2010, Sherry started marketing fixed indexed annuities
20 for Allianz. (Tr. 579, 582-83.) Sherry marketed and sold fixed
21 indexed annuities for Allianz at all times material to this
22 matter. (Id.) At all times material to this matter Sherry was
23 not licensed as a securities salesperson, an investment advisor,
24 or an investment adviser representative in Montana. (Tr. 399,
25 434.)

1 3. In connection with his sales of annuities for Allianz,
2 Sherry was contracted with a field marketing organization known
3 as Life Sales, LLC (Life Sales). (Tr. 498; Exh. 1.) Life Sales
4 sent out marketing mailers in Montana which purported to offer
5 information on reducing income taxes on Social Security benefits.
6 (Tr. 13-14, 499; Exhs. 1-2.) The marketing mailers appear to
7 target older people of pre-retirement and retirement age because
8 they purport to offer information on reducing income taxes on
9 Social Security retirement income benefits. (Tr. 13-15; Exhs.
10 1-2.) The marketing mailers were a device for generating leads
11 or "prospects" for Allianz insurance producers. (Tr. 498-99;
12 Exhs. 1-2.) The marketing mailers provided a return mailer for
13 prospects to send in and provide their signatures, phone numbers,
14 and dates of birth in exchange for a booklet. (Exhs. 1-2.)

15 4. The [REDACTED] are each in their seventies. (Tr. 7, 294,
16 401, 407; Exh. 16.)

17 5. [REDACTED] responded to a marketing mailer
18 discussing how they may be able to reduce taxes on their Social
19 Security income. (Tr. 13-16; Exh. 2.) Subsequently, on or about
20 December 8, 2010, M [REDACTED] received a call from Sherry who
21 arranged a meeting with the Conleys at the Kalispell Mall for the
22 following day. (Tr. 16-17, 499.)

23 6. In agreeing to meet with Sherry, the [REDACTED] did not
24 have any intention of liquidating their investments, buying fixed
25 or equity indexed annuities, or purchasing anything else, but
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1 expected to find out how they were going to save on their income
2 taxes. (Tr. 15-17.)

3 7. At that Kalispell meeting, Sherry's conversation with
4 the [REDACTED] turned quickly from saving income tax on [REDACTED]
5 Social Security incomes to Sherry's mentioning a package to get
6 the [REDACTED] to where they wouldn't have to pay any tax on their
7 money. This ultimately led to Sherry asking the [REDACTED]
8 questions regarding their financial situation in order to fill
9 out a "Family Financial Analysis" form. (Tr. 17-19, 499, 506-07;
10 Exhs. 32, 78.)

11 8. Sherry admits to asking the [REDACTED] questions about
12 their financial priorities, their sources of income, and their
13 securities with John Hancock and SunAmerica including the cash
14 value and the accumulation value of those securities at the
15 Kalispell Mall meeting. (Tr. 354, 501-03; Exh. 78.)

16 9. Sherry testified to stating the following at the end of
17 the Kalispell Mall meeting:

18 [REDACTED] let, let me, you know, quickly ask you,
19 because you're, you say you're concerned about
20 protecting your principal, you say you're concerned
21 about the market risk, and yet you're not really that
22 concerned about interest rates. What, what if I was
23 able to share with you a product that gave you security
24 against risk in the down trend of the market; that gave
25 you, you know, gave you a, a fairly decent rate of
26 return when the market is up, but when the market's
down, you wouldn't lose anything. It would lock in any
gains or at least protect your principal for that year.

24 (Tr. 507.)

1 10. In his letter to Herman, Sherry admitted to asking the
2 following questions and making the following statement at the end
3 of the Kalispell Mall meeting: "At this point, I imposed a few
4 questions to Mr. and Mrs. [REDACTED] 'Are you comfortable with where
5 your money is now?'" and "I then asked 'what is your tolerance
6 lever [sic] for risk?'" (Emphasis added.) "I then introduced
7 into the conversation the possibility of considering a product
8 that would guarantee their principal against any risk at all,
9 while potentially earning a return based on index growth." (Exh.
10 32, ¶ 5.)

11 11. The preceding, admmissive discourse between Sherry and
12 the [REDACTED] at the Kalispell Mall meeting indicates Sherry issued
13 a suggestion to the [REDACTED] that they sell their existing
14 securities and purchase fixed indexed annuities he was selling.
15 (Tr. 18-19, 507; Exh. 32.)

16 12. At least three subsequent meetings occurred between
17 Sherry and the [REDACTED] two of which were at their home and one
18 at a restaurant. The dates of these subsequent meetings were
19 December 13, 16, and 21, 2010. (Tr. 22-23, 439-44, 507, 511,
20 514, 547-49, 551, 560, 562-65, 567-69; Exh. 32.) A December 13,
21 2010, meeting at the [REDACTED] home was long, lasting over four
22 hours. (Tr. 440-41, 444; Exh. 32.) A total of four meetings
23 took place between Sherry and the [REDACTED] (Tr. 439.)

24 13. At one or more of these meetings Sherry exhibited and
25 gave to the [REDACTED] promotional materials and marketing
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1 illustrations from Allianz of fixed indexed annuities he was
2 trying to sell to the [REDACTED] (Tr. 18-19, 27-28, 511-45; (Exhs.
3 3, 20.)

4 14. Sherry requested from the [REDACTED] documents relating to
5 their investments with John Hancock and SunAmerica, including
6 monthly statements and contracts (Tr. 24-25, 66, 145), which he
7 then analyzed and compared to the fixed indexed annuities he was
8 selling, and advocated the [REDACTED] replace their securities with
9 the fixed indexed annuities he was offering for sale. (Tr.
10 24-25, 29, 262, 271-74, 333.)

11 15. Sherry denies: (i) ever suggesting anything to the
12 [REDACTED] about liquidating anything, (ii) ever reviewing any
13 documents claimed in this case having anything to do with
14 investments or otherwise, (iii) ever giving the [REDACTED]
15 recommendations regarding doing or not anything with their
16 variable annuity or any other existing annuity that they had in
17 place, and (iv) ever analyzing or breaking down how they would be
18 either better off or not by going with his product. (Tr. 579.)

19 16. However in a letter to Herman, Sherry admits the
20 following:

21 (i) I did not want to place him [Mr. [REDACTED]] into the
22 identical situation that he had with John Hancock in
23 the sense of paying for an income rider (Guaranteed
24 Minimum Withdrawal Benefit, item 8 Attached) that was
25 costing him 60 basis points annually at a cost of
26 somewhere between \$790 to \$918 depending on whether or
not that basis point fee was based on the original
premium of \$153K or the then-reduced accumulation value
of about \$133K-which he had chosen to activate nearly
immediately after the JH contract was placed in force,

1 NOT realizing that his fees for such an early
2 activation was counter-productive [sic] on the benefit
3 that that rider was to provide. With this in mind, the
4 Allianz Endurance Plus offered him a similar benefit
(Enhanced Withdrawal Benefit) that would give him a 20%
bonus, giving him an income base of \$144,000 to start
from, but without costing him anything at all in fees!

5 (ii) I did not ad [sic] on the Simple Income III Rider onto
6 Mrs. [REDACTED] new contract essentially for the same
7 reason! She too was paying a rider fee that was
8 canceling out the purpose of the Rider . . ." deferring
9 income for the purpose of income growth! I felt she
would be better off (emphasis added) taking an annual
penalty-free withdrawal than tacking on an added "rider
fee" that would not produce what the rider was designed
to produce; "Income value cost-basis growth"!

10 (iii) [W]e discussed further the benefits of placing their
11 funds [held in securities] with Allianz.

12 (Exh. 32.)

13 17. In a subsequent letter to Herman, Sherry admits to the
14 following:

15 (i) I thoroughly reviewed with Mr. [REDACTED] the fact that
16 after taking the same amount of withdrawal each year
17 starting in the 13th month, and then "activating" the
18 Enhanced Withdrawal Benefit" with Allianz in year
19 eleven, his base distribution amount started out at
20 about \$300 [three-hundred] less when compared to what
21 he was taking both from his present Income Rider Base
22 with his John Hancock contract-which I made perfectly
23 clear to both of them-would no longer be guaranteed by
their respective carriers once the transfer was
made-and within the 10% penalty-free annual withdrawal
being taken with Allianz . . . as compared to his
present income amount that would NEVER increase unless
the market gave him a high enough return as to as to
surpass the value of his original premium of \$153,000
which would require an astounding rate of return that
would have to exceed the amount of income he had been
taking for the last three years or so.

24 (ii) We calculated together that if he had simply placed his
25 original \$153,000 in a savings account without
26 interest, and continued to withdraw from that account
the same amount as the income he was taking from the

1 John Hancock Annuity, he would have had an estimated
2 \$3,000 [Three-Thousand] more in value than what he had
in his accumulation value with John Hancock

3 (Exh. 33.)

4 18. Sherry completed Annuity Application forms, Product
5 Suitability forms, Authorization to Transfer Funds forms,
6 Replacement Comparison forms, and Important Notice: Replacement
7 of Life Insurance or Annuities forms for the [REDACTED] and had them
8 sign Statement(s) of Understanding. (Exhs. 4-9, 21-24, 26,
9 28-29.) Additionally, Sherry clearly analyzed and broke down the
10 [REDACTED] securities in documents partially titled "Present Policy
11 Results Breakdown." (Exhs. 30, 101.)

12 19. Sherry indicated on the Replacement Comparison forms
13 for the [REDACTED] that he initiated the sale of their variable
14 annuities. (Exhs. 8, 28.)

15 20. Sherry included a summary of the reason for the
16 replacement in Mr. [REDACTED] Replacement Comparison Form that
17 read: "[v]ariable annuity; since May 2007 there has been no
18 growth in market volatility [sic] - actually showing losses even
19 after suppl [sic] income distribution has been calculated.
20 Applicant wants safety of principal while having possible market
21 growth - wants to eliminate 'risk.'" (Exh. 8.)

22 21. Deputy Securities Commissioner, Lynne Egan (Egan) who
23 has more than 28 years of experience in securities work, ten
24 years with a brokerage and eighteen years with the CSI (Tr. 396),
25 testified as well that the foregoing statement of Sherry
26

1 indicates to her that Sherry didn't know what market volatility
2 was:

3 Market volatility does not grow. And since May of '07,
4 from May of '07 to December of 2010, the market had
5 improved substantially from what was nearly a low to
6 halfway back to where it is today. Which demonstrates
7 to me that the replacement comparison . . . if the, if
8 the [REDACTED] were really thinking this and you're just
9 memorializing what they're thinking, they didn't know
10 what they were doing, and, and you should have sent
11 them to someone that could correct their thought
12 process.

13 (Tr. 428-29.) Egan further testified:

14 Stock markets are volatile. They tend to fluctuate.
15 They go up and down based on the economy, but over
16 time, the market generally performs in an upward
17 fashion. It has since 1930. But it is volatile and
18 the, the riders that the [REDACTED] purchased insulated
19 them from market volatility. It provided them with a
20 guaranteed monthly income stream, something that they
21 had requested and paid for when they purchased their
22 variable annuities, and that market volatility wasn't
23 an issue based on what they were using their annuity
24 for.

25 (Tr. 408.)

26 22. Sherry's summary of the reason for the replacement in
Mrs. [REDACTED] "Replacement Comparison" form states:

See Suppl [sic] letter attached. Client/Applicant is
in agreement with spouse to conserve the principal
against market risk as compared to the present variable
annuity.

21 (Exh. 28.) Sherry omitted from the form the type and value of
22 Mrs. [REDACTED] lifetime income benefit rider and the value of her
23 death benefit for her variable annuity. (Id).

24 23. In his response letters to Herman, Sherry admits to
25 reviewing the [REDACTED] variable annuities, analyzing specific
26

1 riders within the annuities, and reaching conclusions regarding
2 the suitability of the [REDACTED] liquidating the variable annuities
3 for the purpose of purchasing the fixed indexed annuities he was
4 selling. (Tr. 262, 271-72, 333; Exhs. 32-33.) Sherry admitted
5 the same to Egan on the telephone. (Tr. 416-17.)

6 24. Clearly, Sherry did all he denies, including comparing
7 his insurance products with the [REDACTED] securities, conducting
8 analyses, and advising, e.g. Mr. [REDACTED] having been better off
9 putting his money in a savings account without interest than in
10 the John Hancock variable annuity, thereby valuing it as less
11 than worthless, among other financial advice.

12 25. Sherry told the [REDACTED] that they had a 30-day window
13 within which to decline the fixed indexed annuities, and undo the
14 transactions without any consequences. (Tr. 144; Exhs. 32, 36.)

15 26. Mrs. [REDACTED] described Sherry as being a high pressure
16 salesman. (Tr. 354, 445.) This is affirmed by Mr. [REDACTED]
17 testimony as to Sherry's actions with him (Tr. 25-27, 66, 68-69,
18 74-75, 78-79, 144-45, 285, 341; Exh. 36) and confirmed by
19 Sherry's subsequent actions.

20 27. Sherry had the [REDACTED] contact John Hancock and
21 SunAmerica to get information regarding their variable annuities.
22 (Exhs. 65-66.) Although the [REDACTED] had reservations about
23 replacing their variable annuities with the fixed indexed
24 annuities Sherry was offering, on December 16, 2010, the [REDACTED]
25 ultimately relented and signed the replacement paperwork at
26

1 Sherry's request but with a firm and explicit processing
2 restriction. (Tr. 25, 341, 355.) Notwithstanding Mr. [REDACTED]
3 giving Sherry firm instructions not to proceed with the
4 transaction until he called Sherry with permission to process it
5 (Tr. 25, 74, 140, 145, 341, 355; Exh. 36), Sherry mailed Allianz
6 the paperwork to liquidate the variable annuities on the very
7 next day, i.e. December 17, 2010. (Exh. 32.) Sherry did this
8 despite Mr. [REDACTED] having explicitly informed Sherry several
9 times not to process the signed forms because he wanted to
10 discuss this further with his wife as well as his investment
11 advisor representative, George Withey, who had sold the [REDACTED]
12 their existent John Hancock and SunAmerica policies. (Tr. 25,
13 127-35.)

14 28. Allianz received the paperwork on December 20, 2010.
15 (Exhs. 32, 76-77.) Thereafter, Mrs. [REDACTED] SunAmerica variable
16 annuity, with an accumulation value of approximately \$81,000, was
17 liquidated and the fixed indexed annuity Allianz Contract was
18 issued. Likewise, Mr. [REDACTED] John Hancock variable annuity,
19 with an accumulation value of approximately \$131,000, was
20 liquidated and the fixed indexed annuity Allianz Contract was
21 issued. (Tr. 25-26; Exhs. 8, 28.)

22 29. As a result of the replacement of the [REDACTED] variable
23 annuities without having the [REDACTED] permission to do so,
24 surrender charges in the respective amounts of \$10,389.06 for Mr.
25
26

1 [REDACTED] and \$5,185.00 for Mrs. [REDACTED] were incurred. (Exhs. 19,
2 28, 41.)

3 30. Three or four days subsequent to December 16, 2010,
4 Sherry called the [REDACTED] and advised them that their Allianz
5 contracts were on the way. (Tr. 70, 74.) Regarding this call,
6 Mr. [REDACTED] told Sherry to cancel them since Sherry had not
7 received permission to process their applications. (Tr. 70, 74,
8 78-79, 140.) Sherry attempted to talk Mr. [REDACTED] out of not
9 going through with the transaction and staying with his proposal.
10 (Tr. 74-75, 78-79.) Not wanting to take "no" for an answer,
11 Sherry called the [REDACTED] back eight times to try to convince
12 them to change their minds. (Tr. 78-79.)

13 31. George Spencer Withey (Withey) is licensed as an
14 independent insurance broker, registered as an investment broker
15 and licensed in fifteen states including Montana, and has been in
16 the financial services business since June of 1986. (Tr. 125.)
17 Withey's specialty area of twenty years is predominantly income
18 planning and estate planning. (Tr. 126.)

19 32. Withey has been the [REDACTED] investment advisor
20 representative since 2006 (Id.) and placed the [REDACTED] in their
21 John Hancock and SunAmerica investments in 2007. (Tr. 127-35.)

22 33. A December 22, 2010, meeting between Withey and the
23 [REDACTED] was rescheduled to December 30, 2010, at which time
24 Withey met with the [REDACTED] at their home to discuss their
25 investment portfolios and recommended that they move some money
26

1 out of bonds and into equities. (Tr. 136-37, 142.) Mr. [REDACTED]
2 mentioned the marketing mailer relating to saving money on taxes
3 at that meeting. He did not inform Withey that they had signed
4 replacement paperwork, but did say to Withey, "It's probably
5 nothing that you can do anyway, so just forget it." Withey then
6 proceeded to talk with the [REDACTED] about their estate plan, which
7 was significant and received permission to modify their
8 investment portfolios. (Tr. 136-38; Exh. 102.)

9 34. Because of the New Year Holiday, Withey did not return
10 to his office until January 5, 2011, at which time while going
11 on-line to modify the [REDACTED] investment portfolios, Withey
12 discovered that the [REDACTED] John Hancock and SunAmerica
13 investments had been, or were in the process of liquidation.
14 (Tr. 137.) Assuming the [REDACTED] already knew they were
15 transferring this money and decided not to tell him for some
16 unknown reason, Withey sent the [REDACTED] a letter expressing his
17 shock that they had not informed him of the replacement. (Tr.
18 138; Exh. 102.)

19 35. In the January 5, 2011, letter, Withey also wished them
20 the best of luck, but advised them of what they left behind (Tr.
21 138; Exh. 102) and additionally apprised them that the longer the
22 duration of the surrender period of an annuity, the higher the
23 commission that the insurance producer, securities salesperson,
24 investment advisor, or investment advisor representative will
25 receive. (Tr. 153; Exh. 102.)

26

1 36. In December 2010, the time remaining in the surrender
2 period for Mrs. [REDACTED] variable annuity was about two months,
3 and the remaining time in the surrender period for
4 Mr. [REDACTED] variable annuity was around four years. (Tr. 135.)

5 37. Withey testified that liquidating the [REDACTED] variable
6 annuities to purchase the fixed indexed annuities was not
7 suitable for them. (Tr. 237-38.)

8 38. Upon receiving Withey's January 5, 2011, letter, the
9 [REDACTED] called Withey and advised him of how Sherry had proceeded
10 to process the paperwork despite their specific instructions not
11 to do so until they called him back after having a chance to
12 discuss it. Withey advised the [REDACTED] that if they hadn't
13 received the contracts yet, and didn't want them, they could
14 return them with the hope the companies would accept the money
15 back. He further advised them that there was no requirement for
16 the companies to do so. (Tr. 140.)

17 39. Withey testified that based on the conversation he had
18 with the [REDACTED] (Tr. 144), fear of the market was used by Sherry
19 as a motivating factor to get the [REDACTED] to sell their variable
20 annuities. (Tr. 146.)

21 40. The [REDACTED] subsequently declined the Allianz Contracts
22 and instructed Allianz to return the funds to SunAmerica and John
23 Hancock. (Exh. 10.) Allianz refunded the [REDACTED] money.
24 (Exhs. 11, 31.)

1 41. Both SunAmerica and John Hancock refused to accept the
2 funds back, reinstate the contracts and the [REDACTED] lifetime
3 income benefit riders. (Tr. 154, 156.) Subsequently, Withey was
4 able to convince SunAmerica to re-instate Mrs. [REDACTED] variable
5 annuity, but at a lower income base and in exchange for Withey's
6 agreement to forego his commission for four years. (Tr. 169.)

7 42. Because Sherry had misrepresented to the [REDACTED] that
8 the replacement of their variable annuities could be cancelled
9 and they would suffer no financial consequences, Allianz settled
10 with Mr. [REDACTED] for \$10,389.06, the amount he incurred in
11 surrender charges and a rider fee. (Exh. 19.) Recitals D-E of
12 the Settlement Agreement and Release between Allianz and Mr.
13 [REDACTED] state: "Based on agent Robert Sherry's assurance that
14 funds could be returned to the original carrier without any costs
15 or consequences . . . Allianz Life is willing to reimburse Mr.
16 [REDACTED] for surrender charges and the rider fee that he incurred
17 as a result of this transaction." (Exhs. 19, 44.) Withey
18 reinvested Mr. [REDACTED] money in a Jackson National variable
19 annuity with a four-year surrender, but at a lower income base.
20 (Tr. 156.)

21 43. As a result of the transactions at issue:

- 22 (a) Mr. [REDACTED] had a loss of \$38,869.69 to his income
23 benefit base and Mrs. [REDACTED] had a loss of
24 \$21,966.47 to her income benefit base. (Tr. 167,
25 169.)
26 (b) Mr. [REDACTED] lost three monthly income payments of
27 \$638.92 for the months of January through March
28 2011, or a total of \$1,916.76, prior to investing

1 in another variable annuity; and Mrs. [REDACTED] lost
2 three monthly income payments of \$458.03, or a
3 total of \$1,374.09, prior to being reinstated in
4 her variable annuity. (Tr. 179; Exh. 95.)

5 (c) Mr. [REDACTED] lost \$6,000.07, and Mrs. [REDACTED] lost
6 \$6,662.97 in death benefits. (Tr. 179, 182; Exhs.
7 39, 43.)

8 44. Also as a result of the transactions at issue, and
9 because of the reduction of the [REDACTED] income bases in their
10 new or reinstated variable annuities, Mr. [REDACTED] lost \$161.95 per
11 month beginning in January of 2011, for the rest of his life; and
12 Mrs. [REDACTED] lost \$93.04 per month beginning in January of 2011,
13 for the rest of her life.¹ (Tr. 167-71.)

14 45. Egan testified that although from the insurance side
15 Sherry is required to conduct a suitability analysis for the
16 purchase of equity indexed or the fixed annuities, he crossed the
17 line by conducting a suitability analysis for purposes of
18 selling, liquidating a security in order to purchase the fixed
19 indexed annuities he was selling. (Tr. 403.)

20 46. Egan concluded that Sherry violated the Securities Act
21 by failing to tell the [REDACTED] that he was required to have a
22 securities license in order to make the recommendation to the
23 [REDACTED] to liquidate their securities. (Tr. 404.) Egan said
24 that this conclusion would not change if there was testimony that

25 ¹At Tr. 168, Withey erroneously calculated 5 percent of
26 \$38,869.69 to be \$1,443.48. The correct number is \$1,943.48 which
when divided by 12 equals a monthly income distribution loss for Mr.
[REDACTED] of \$161.95. The total combined monthly income loss to Mr. and
Mrs. [REDACTED] therefore, is \$254.99 as opposed to \$227.04 as Withey
testified at Tr. 185.

1 Sherry had told the [REDACTED] that he was not a broker. She
2 stated:

3 A broker sells products. He wasn't selling them a
4 security. An investment advisor advises as to the
5 appropriateness of holding or selling a security and he
6 was transacting investment advisory business. He
7 wasn't selling them a security. He was recommending
8 they get out of a security.

9 (Tr. 404.)

10 47. Egan testified that in her opinion:

11 (a) Sherry's recommendation to liquidate the [REDACTED]
12 variable annuities in exchange for the fixed
13 indexed annuities was not a suitable
14 recommendation. (Tr. 407.)

15 (b) Sherry violated the Securities Act by comparing
16 the [REDACTED] securities with his fixed indexed
17 annuities in the Replacement Comparison forms.
18 (Tr. 409, 411, 414-15.)

19 (c) To consummate a securities transaction without the
20 permission of persons holding the securities is an
21 unauthorized transaction which violates the
22 Securities Act. (Tr. 405.)

23 From the foregoing findings of fact, the Hearing Examiner
24 makes the following proposed:

25 CONCLUSIONS OF LAW

26 1. The Commissioner of Securities and Insurance, Montana
State Auditor (Commissioner) has jurisdiction over this matter
pursuant to Mont. Code Ann. §§ 2-15-1901, 2-15-1903, 30-10-107,
30-10-201, 30-10-301, 30-10-304, and 30-10-305.

2 The administration of the Securities Act of Montana
(Act), Mont. Code Ann. §§ 30-10-101, et seq., is under the

1 supervision and control of the Commissioner. Mont. Code Ann. §
2 30-10-107, MCA.

3 3. Pursuant to Mont. Code Ann. §§ 30-10-102 and 30-10-309,
4 the Commissioner is required to administer the Act to protect
5 investors, persons engaged in securities transactions, and the
6 public interest, including administration of restitution dollars.

7 4. The Commissioner is also required to administer the
8 Montana Insurance Code (Code), Mont. Code Ann. §§ 33-1-101, et
9 seq., to ensure the interests of insurance consumers are
10 protected. Mont. Code Ann. § 33-1-311, MCA. Under the Code the
11 Commissioner is responsible for regulating insurance producers.
12 (*Id.*)

13 5. Respondent, Sherry is a "person" as defined by Mont.
14 Code Ann. § 30-10-103(16).

15 6. Although generally most annuity contracts are life
16 insurance products and governed by the Montana Insurance Code,
17 and may be sold by insurance producers, *Estate of Miles v. Miles*,
18 298 Mont. 312, 994 P.2d 1139 (2000); Mont. Code Ann. §§
19 33-17-214, 33-20-101, the definition of a "security" under the
20 Act (Securities Act of Montana Act) includes a "variable"
21 annuity. Mont. Code Ann. § 30-10-103(22), MCA; *SEC v. Variable*
22 *Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959); *Estate of*
23 *Miles, supra.*

24 7. An "investment adviser" is a person who, for
25 compensation, engages in the business of advising others, either
26

1 directly or indirectly through publications or writings, as to
2 the value of securities or as to the advisability of investing
3 in, purchasing, or selling securities. Mont. Code Ann.
4 § 30-10-103(11)(a). This definition also includes a person who
5 as an integral component of other financially related services,
6 provides the foregoing described services. Mont. Code Ann.
7 § 30-10-103(11)(b).

8 8. An "investment advisor representative" includes any
9 person occupying a similar status or performing similar
10 functions, or other individual, except clerical or ministerial
11 personnel, employed by or associated with an investment adviser
12 who: (a) makes any recommendation or otherwise renders advice
13 regarding securities to clients; (b) manages accounts or
14 portfolios of clients; (c) solicits, offers, or negotiates for
15 the sale or sells investment advisory services; or (d) supervises
16 employees who perform any of the foregoing. Mont. Code Ann.
17 § 30-10-103(12)(a).

18 9. It is unlawful for a person to transact business in
19 this state as an investment adviser or as an investment adviser
20 representative unless the person is registered as such under the
21 Act. Mont. Code Ann. § 30-10-201(3).

22 10. The actions of gathering financial and securities
23 investment information from prospective new clients and obtaining
24 their signatures on the securities transaction forms,
25 confidential personal financial planning forms, change of
26

1 investment objective forms, account transfer forms and durable
2 power of attorney forms are "the crux of a securities
3 transaction." *Knowles v. State ex rel. Lindeen*, 2009 MT 415, MT
4 ¶ 32, 353 Mont. 507, 222 P.3d 595, 605 (2009). There is no
5 dispute that Sherry filled out and had the [REDACTED] sign Annuity
6 Application forms, Product Suitability forms, Authorization to
7 Transfer Funds forms, Replacement Comparison forms, and Important
8 Notice: Replacement of Life Insurance or Annuities forms and
9 Statement(s) of Understanding. As in *Knowles*, these forms
10 likewise were the crux of the securities transactions consummated
11 at issue in this matter. The witness testimonies, documentary
12 evidence, including Sherry's actions and admissions, clearly
13 demonstrate to the undersigned that Sherry through his explicit,
14 as well as implicit actions, conveyed financial advice to the
15 [REDACTED] to liquidate their variable annuities in order to
16 purchase fixed indexed annuities from him to his compensatory
17 benefit, all without being registered as an investment advisor or
18 an investment advisor representative. By doing so, Sherry
19 violated Mont. Code Ann. § 30-10-201(3).

20 11. Given the context of what occurred in this matter,
21 Sherry additionally violated Mont. Code Ann. § 30-10-201(3) by
22 advising the [REDACTED] also to his compensatory benefit, as to the
23 value of their variable annuities by telling Mr. [REDACTED] of having
24 been better off putting his money in a savings account without
25 interest than in the John Hancock variable annuity.

1 12. It is unlawful for any person, in connection with the
2 offer, sale, or purchase of any security in, into, or from this
3 state to make any untrue statement of material fact or omit to
4 state a material fact necessary in order to make the statements
5 made, in light of the circumstances under which they are made,
6 not misleading. Mont. Code Ann. § 30-10-301(1)(b). Sherry
7 violated Mont. Code Ann. § 30-10-301(1)(b) by:

- 8 (a) advising the [REDACTED] that they would be in a
9 better position by liquidating their variable
10 annuities with guaranteed benefit riders, and
11 purchasing the fixed indexed annuities he was
12 selling when such a recommendation was unsuitable
13 for them;
- 14 (b) telling the [REDACTED] that they could undo the
15 transactions at issue without any consequences
16 within 30 days;
- 17 (c) omitting information relating to the value of Mrs.
18 [REDACTED] lifetime income benefit rider, and the
19 value of her death benefit from her Replacement
20 Comparison form;
- 21 (d) failing to tell the [REDACTED] that he was required
22 to have a securities license in order to make the
23 recommendation to the [REDACTED] to liquidate their
24 securities.

25 13. It is unlawful for any person, in connection with the
26 offer, sale, or purchase of any security, directly or indirectly,
in, into, or from this state to engage in any act, practice, or
course of business that operates or would operate as a fraud or
deceit upon any person. Mont. Code Ann. § 30-10-301(1)(c).
Sherry violated Mont. Code Ann. § 30-10-301(1)(c) by:

- (a) recommending to the [REDACTED] that they sell their
variable annuities in order to purchase fixed
indexed annuities from him without the requisite

1 licensure, skill, and knowledge to ascertain
2 whether the sales of their variable annuities and
3 the purchase of fixed indexed annuities were
4 suitable for them;

5 (b) by submitting the paperwork to liquidate these
6 variable annuities without authorization from the
7 [REDACTED];

8 (c) by telling the [REDACTED] that they could undo these
9 transactions within 30 days without consequences.

10 14. Sherry used fraudulent, coercive, and dishonest
11 practices in his conduct with the [REDACTED] and was a source of
12 injury and loss to them by leading them to believe that they
13 would be in a better position by liquidating their variable
14 annuities and purchasing fixed indexed annuities from him which
15 caused them pecuniary loss.

16 15. The Commissioner may require a person found to have
17 committed a violation of Mont. Code Ann. § 30-10-301 to make
18 restitution for all financial losses sustained by any person as a
19 result of the violation. The Commissioner may further require a
20 person found to have violated Mont. Code Ann. § 30-10-301 to pay
21 10% annual interest on the amount of the restitution from the
22 date of the violation, reasonable attorney fees, and costs
23 associated with bringing the administrative action. Mont. Code
24 Ann. § 30-10-309.

25 16. The Commissioner may impose a fine not to exceed \$5,000
26 per violation upon a person found to have engaged in any act or
27 practice constituting a violation of any provision of the Act.
28 Mont. Code Ann. § 30-10-305.

17. The Commissioner may suspend, revoke, or refuse to renew an insurance producer's license and/or levy a civil penalty in accordance with Mont. Code Ann. § 33-1-317, or may choose any combination of actions when an insurance producer has, in the conduct of the affairs under the license, used fraudulent, coercive, or dishonest practices or the licensee or applicant is incompetent, untrustworthy, financially irresponsible, or a source of injury or loss to the public. Mont. Code Ann. § 33-17-1001(1)(f).

18. The Commissioner may impose a fine not to exceed the sum of \$5,000 per violation upon an insurance producer found to have violated a provision of the Code. Mont. Code Ann. § 33-1-317.

From the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner proposes to the Commissioner the following:

ORDER

1. In accordance with Mont. Code Ann. § 30-10-305,
Robert L. Sherry is hereby fined \$5,000 for each of his following
violations of Mont. Code Ann. § 30-10-201(3):

- (a) giving investment advice, for compensation, to the [REDACTED] without a securities license;
- (b) giving investment advice, for compensation, to the [REDACTED] by advising them as to the value of their securities.

2. In accordance with Mont. Code Ann. § 30-10-305, Sherry is hereby fined \$5,000 for each of his following violations of Mont. Code Ann. § 30-10-301(1)(b):

- 1 (a) telling the [REDACTED] they could undo the
2 transactions at issue within 30 days without any
3 consequences;
- 4 (b) omitting information relating to the value of Mrs.
5 [REDACTED] lifetime income benefit rider and the
6 value of her death benefit from her Replacement
7 Comparison form;
- 8 (c) failing to tell the [REDACTED] that he (Sherry) was
9 required to be securities licensed in order to
10 make the recommendation to the [REDACTED] to sell
11 their securities.

12 3. In accordance with Mont. Code Ann. § 30-10-305, Sherry
13 is hereby fined \$5,000 for each of his following violations of
14 Mont. Code Ann. § 30-10-301(1)(c):

- 15 (a) recommending to the [REDACTED] that they sell their
16 variable annuities in order to purchase the fixed
17 indexed annuities from him without the requisite
18 licensure, skill, and knowledge to ascertain
19 whether the sales of their securities and the
20 purchases of fixed indexed annuities were suitable
21 for them;
- 22 (b) submitting the paperwork to liquidate the [REDACTED]
23 variable annuities and purchase his fixed indexed
24 annuities without authorization from the Conleys;
- 25 (c) telling the [REDACTED] that they could undo the
26 transactions at issue within 30 days without
consequences.

27 4. In accordance with Mont. Code Ann. § 33-1-317 and
28 § 33-17-1001, Sherry is hereby fined \$5,000 for engaging in
29 conduct that was fraudulent, coercive, or dishonest practices and
30 for being a source of injury or loss to the public in violation
31 of Mont. Code Ann. § 33-17-1001.

32 5. In accordance with Mont. Code Ann. § 30-10-309, Sherry
33 shall pay restitution to the [REDACTED] for all financial losses

1 sustained by the victims as a result of each of the violations of
2 Mont. Code Ann. § 30-10-301, together with ten percent (10%)
3 annual interest from the date of the violations or the date each
4 monthly payment became due, on the amounts which may be
5 determined and calculated at the time of the issuance of the
6 Commissioner's Final Agency Decision.

7 6. In accordance with Mont. Code Ann. § 30-10-309(1),
8 Sherry shall pay any and all costs related to this proceeding
9 within 30 days of this Order. These costs shall include
10 reasonable attorney fees, and costs associated with bringing the
11 administrative action, the amounts of which may be determined and
12 calculated at the time of the issuance of the Commissioner's
13 Final Agency Decision.

14 7. Pursuant to Mont. Code Ann. § 33-17-1001(1):

- 15 (a) the insurance producer license of Robert L. Sherry
16 is hereby revoked;
- 17 (b) the revocation of Sherry's individual producer
18 license, and all but \$5,000 in fines shall be
19 suspended conditional upon Sherry making
20 restitution to the [REDACTED] as may be set forth in
the Commissioner's Final Agency Decision, except
that Sherry will be issued a probationary license,
the terms of which may be determined in the
Commissioner's Final Agency Decision herein.

21 NOTICE OF NECESSITY TO FILE EXCEPTIONS TO THESE PROPOSED
22 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
WITHIN 30 DAYS OF THE DATE OF THIS DECISION

23 Pursuant to the Montana Administrative Procedures Act
24 at Mont. Code Ann. § 2-4-621, adversely affected
25 parties in this case have the opportunity to file
26 written exceptions with supporting briefs and to
present an oral argument to the Commissioner of
Securities and Insurance or her designee. If a party

1 does not file exceptions to the above Proposed Findings
2 of Fact, Conclusions of Law and Order with the
3 Commissioner of Securities and Insurance, Office of the
4 State Auditor, at 840 Helena Avenue, Helena, MT 59601,
5 within 30 days of the date of this decision, this will
6 constitute a waiver of an adversely affected party's
7 right to judicial review of this decision pursuant to
8 Mont. Code Ann. § 2-4-702. Exceptions must be filed in
9 order to exhaust all administrative remedies available
10 to any party who believes he/she is aggrieved by this
11 proposed decision.

12 Dated this 25th day of October, 2012.

13 /s/Michael J. Rieley
14 Michael J. Rieley, Hearing Examiner

15 CERTIFICATE OF SERVICE

16 I do hereby certify I served a copy of the foregoing Hearing
17 Examiner's Proposed Findings of Fact, Conclusions of Law, and
18 Order upon all parties of record on the 25th day of October,
19 2012, by mailing, faxing, e-mailing, or hand delivering a copy
20 thereof to:

21 Mr. Mike Winsor
22 Special Assistant Attorney General
23 State Auditor's Office
24 840 Helena Avenue
25 Helena, MT 59601

Mr. Robert Sherry
804 8th Avenue West
Kalispell, MT 59901

26 /s/Gwendolyn A. Vashro
Gwendolyn A. Vashro

6912 7.3

Michael J. Rieley, D.C.
Attorney at Law

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7 West Sixth Avenue
P.O. Box 1211
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(406) 443-4433
Telecopier (406) 443-0039

2012 NOV 5 11:30
E-Mail mikeratlaw@msn.com

Gwendolyn A. Vashro, PP, CLA, PLS
Paralegal

November 2, 2012

State Auditor's Office
840 Helena Avenue
Helena, MT 59604

Re: Case No. SEC-2011-239
In The Matter of Robert Sherry

Handwritten: JAL
4.8.12

STATEMENT

Handwritten: AS
11-13-12

PROFESSIONAL SERVICES RENDERED

July 2012

23 Receive and review e-mail correspondence between
Department and Sherry;
MJR .10 hour

September 2012

4 Receive and review e-mail correspondence between
Department and Sherry;
MJR .10 hour

October 2012

12 Review transcript and Department's and Sherry's
proposed findings; begin drafting findings and
conclusions; MJR 7.50 hours

14 Continue drafting findings and conclusions;
MJR 4.40 hours

15 Continue drafting findings and conclusions;
MJR 2.80 hours

Exhibit B

17	Continue drafting findings and conclusions; MJR	3.70 hours	
18	Continue drafting findings and conclusions; MJR	5.20 hours	
19	Continue drafting findings and conclusions; MJR	1.70 hours	
22	Continue drafting findings and conclusions; MJR	3.60 hours	
23	Continue drafting findings and conclusions; MJR	1.30 hour	
25	Finalize proposed findings and conclusions; serve same. MJR	<u>1.80 hours</u>	
TOTAL PROFESSIONAL SERVICES		32.20 hours	\$2,254.00

DISBURSEMENTS

November 2012

2	Paralegal expense (itemization attached)	\$17.00	
2	Admin. Costs @ 4% (telephone, photocopies, postage, and fax)	<u>\$90.16</u>	
TOTAL DISBURSEMENTS			<u>\$ 107.16</u>
TOTAL FEES AND DISBURSEMENTS			<u>\$2,361.16</u> =====

Thank You

Insurance Commissioner - Robert Sherry

PARALEGAL SERVICES RENDERED

October 2012

19 E-mail to Mike Winsor regarding authority for
attorney fees and costs; GV .10 hour

22 Receive and review e-mail from Winsor.
GV .10 hour

.20 hour \$17.00